

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARILYN BANKS

Claimant

VS.

US ENGINEERING COMPANY

Respondent

AND

LIBERTY MUTUAL INS. CO.

Insurance Carrier

Docket No. 241,001

ORDER

Claimant requested review of the February 10, 2005 Award by Administrative Law Judge (ALJ) Robert H. Foerschler. The Board heard oral argument on May 25, 2005.

APPEARANCES

Stephen P. Doherty, of Kansas City, Missouri, appeared for the claimant. Stephanie Warmund, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, at oral argument, the parties stipulated that if claimant's recovery is limited to a right knee impairment, the 13 percent to the right knee awarded by the ALJ was appropriate.

ISSUES

The ALJ granted claimant a 13 percent permanent partial impairment to the right knee as a result of her traumatic injury on February 20, 1998. The ALJ declined to award

claimant any impairment to her left lower extremity or general permanent partial (work) disability reasoning that:

While it could be said that her [claimant] work duties were altered following her treatment for the right knee injury in 1998, the notion that this signified some general impairment is obscured by the rather strenuous duties she admits performing subsequently. Obviously she had a convenient relationship with her Union and was accommodated in her assignments. Note that when Dr. Romito noted her left knee complaints, she was already apparently working for another employer.¹

The claimant asserts the ALJ erred in limiting her permanent impairment award to a single scheduled knee injury. Claimant believes the evidence substantiates her claim for a bilateral knee impairment which would have yielded a whole body impairment and has prohibited her from permanently returning to her job as a pipe fitter, thus entitling her to work disability benefits under K.S.A. 44-510e(a). Claimant contends that although she initially injured only her right knee when she fell, thereafter she favored her right knee thus placing additional stress on her lower left extremity. As the natural and probable consequence of her underlying compensable injury, claimant maintains her left knee complaints and attendant impairment are compensable as a single injury to the body as a whole and as general disability under Kansas law. Accordingly, claimant requests that the Board modify the ALJ's Award to include the left knee and award a general permanent partial (work) disability.

Alternatively, claimant has pled her claim as one including a series of injuries culminating on April 8, 1998, her last date worked for this respondent. She maintains the light duty assignment required her to stand at a work bench each day, thus aggravating her condition and giving rise to her left knee complaints. Under either theory, claimant maintains she is entitled to a substantial work disability award.

Respondent argues the ALJ's Award should be affirmed in all respects. Respondent maintains that only claimant's right knee was injured in the traumatic accident that occurred on February 20, 1998. To the extent claimant experienced left knee problems after leaving respondent's employ, those complaints are attributable to her subsequent work activities for other employers. Therefore, this respondent has no liability for that aspect of her alleged impairment.

The issues to be decided by this appeal are as follows:

1. Claimant's date of accident;
2. The nature and extent of claimant's impairment and work disability, if any; and
3. Claimant's average weekly wage at the time of her accident.

¹ ALJ Award (Feb. 10, 2005) at 8.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant is, by training, a pipe fitter, and since the late 1970's and up to 2003, was working out of a local Union Hall in Kansas City. Claimant was assigned to respondent's work site and had only been on the job a little over a week when she was injured. According to her testimony, her hourly rate of pay on the date of injury was \$26.00 and she was required to be available to work 40 hours a week or more, depending upon the employer's requirements.

It is undisputed that claimant injured her right knee on February 20, 1998 when she tripped on some debris and fell, hitting her right knee on a piece of pipe. Claimant was sent to Occupational Health and was later referred to Dr. Lowry Jones. During this period of time claimant was treated conservatively and respondent assigned claimant to perform work at a bench, thus limiting her work activities in the hopes of minimizing any further injury to her right knee. Claimant continued working at the same wage doing the bench work until April 8, 1998. At that point, she began receiving temporary total disability benefits.

When Dr. Jones suggested she might need surgery, claimant requested her care be transferred to Dr. John Romito. Respondent agreed and claimant was referred to Dr. Romito for evaluation and treatment.

Dr. Romito first saw claimant on June 1, 1998. Claimant reported her right knee injury on February 20, 1998, but mentioned nothing about an aggravation to her left knee while working on the bench. Indeed, claimant voiced no complaints about her left knee during this first visit. Dr. Romito reviewed the MRI of claimant's right knee and recommended surgery. He believed the MRI showed a horizontal tear of the posterior horn of the right medial meniscus. Surgery was performed on June 11, 1998, during which Dr. Romito found articular cartilage damage under the patella along with the meniscus tear, which was repaired. Claimant was then referred to physical therapy, and on August 26, 1998, she was seen again for follow-up.

During this visit, claimant complained of "intermittent catching" in her left knee. Dr. Romito examined the knee and indicated her range of motion was full, collateral ligaments were stable and the anterior and posterior drawer tests were negative. He recommend that she wait six weeks and if her complaints did not improve, she should return and Dr. Romito would obtain an MRI scan and additional surgery would be considered.

On October 2, 1998, claimant was released to return to full work duty by Dr. Romito.² Although claimant has testified that she returned to work earlier than that, albeit to some jobs that were, at times, less physically demanding.

On October 16, 1998, Dr. Romito wrote to the respondent's insurance adjuster for the purpose of providing a written opinion as to claimant's permanent impairment rating. He reiterated claimant's course of treatment and assigned a 2 percent permanent partial impairment to the lower extremity.³

Then on November 4, 1998, claimant returned to see Dr. Romito complaining of bilateral knee pain. He noted that claimant "states that she is working, climbing up and down the ladders, doing repetitive squatting and bending and has had exacerbation of right knee pain."⁴ The range of motion in her left knee was full, McMurray's testing was negative and her collateral ligaments were stable. He recommended that she take an over-the-counter product and if her left knee was to become worse, he suggested considering an arthroscopic evaluation.

On January 6, 1999, Dr. Romito apparently saw claimant again and followed his examination with a letter on that same date. The letter, which is addressed "To Whom It May Concern" indicates he believes claimant again has "moderately severe degenerative changes with chondromalacia in the subpatellar region" on the left knee which is very similar to what was found on the right knee.⁵ He recommended she change her occupation and imposed restrictions that allow her to avoid any type of "deep knee bends, squatting, kneeling, climbing or carrying objects over approximately 25-50 pounds on a continual repetitive basis."⁶

Dr. Romito was questioned about the impact of claimant's job duties following the February 20, 1998 injury on her knees. He responded as follows:

...When somebody has an injury where they fell, twisted and fell, she can injure the other one. That one knee--in this case the right knee can be a whole lot worse until we get it doing better, and then the other one starts saying, hey, wait a minute, what about me, I got a problem over here, too.

² Romito Depo., Ex. 2 at 6.

³ Although Dr. Romito did not so indicate, his impairment was for the right lower extremity only.

⁴ *Id.*, Ex. 2 at 4 (Nov. 4, 1998 office note).

⁵ *Id.*, Ex. 2 at 3 (Jan. 6, 1999 letter).

⁶ *Id.*

Then when you couple that with the degenerative changes that she's having and then add to that the activities that I let her go back to do, which was flexing, bending, stooping, climbing, doing all the things that -- I've never been a pipe fitter, but what I guess pipe fitters do -- that that further aggravated both knees. That's how I would end that.⁷

He was also asked whether standing at a bench for a period of 40 or so days would be more likely to cause injury to her left knee when compared to the regular activities of a pipe fitter, including stooping, bending, squatting and climbing ladders. He responded that "standing isn't good for it, but standing compared to the other activities, the other activities are apt to cause more trouble than the standing activities."⁸

Claimant returned to her work as a pipe fitter. According to claimant, Bob Welch, the union official who assigns work, "takes care of you" meaning that he was willing to send her out on what she termed lighter duty jobs.⁹ She testified she was not able to return to the bigger pipe jobs and was limited to commercial jobs, installing instruments and controls.¹⁰ Yet, by her own admission, the jobs she was doing after April 7, 1998, the date she left respondent's employ, were much harder than the job she was doing on the date of her accident, and the jobs exceeded her restrictions. In fact, claimant worked 40 hours per week and some overtime for extended periods followed by periods of layoffs for various employers. This practice continued until December 2003. Claimant even went on to suffer another injury to her shoulder while working as a pipe fitter for another employer.

Since December 2003 claimant has worked only seasonally as a lawn mower in the National Park Service earning \$12.46 per hour, 40 hours per week. That position ended September 24, 2004 and she has not worked anywhere else since that time.

According to the claimant, the surgery to her right knee was not successful and she now has problems with her left knee also. She takes pain relievers twice a day, and indicated that "[i]f I keep enough pain medication in or if I take it on a consistent enough basis then I can get by and it will be tolerable for the day. I always have pain in the right knee."¹¹ She indicated that the pain in the left knee "comes and goes".

Claimant saw Dr. P. Brent Koprivica on March 4, 2004, at her lawyer's direction. At this time claimant was complaining mostly of right knee pain. After an examination, Dr.

⁷ *Id.* at 36-37.

⁸ *Id.* at 38.

⁹ P.H. Trans. at 23.

¹⁰ R.H. Trans. at 23.

¹¹ *Id.* at 19-20.

Koprivica opined that claimant as a direct result of her February 20, 1998 injury, sustained injury to the right knee and that surgery was necessary. During his deposition, Dr. Koprivica was asked to comment upon the left knee and its causal relationship to the claimant's February 20, 1998 accident.

Q. Do you have an opinion as to whether or not the problems in the left knee are related to the original injury to the right knee?

A. I have an opinion.

Q. What is that opinion?

A. In my opinion it was a direct and natural consequence of her protecting the right knee in the fashion she was doing activities of daily living after that.

Q. Is that because of the right knee injury she had to stand different or overuse the knee to a greater extent?

A. Yes.

Q. Which then caused problems in that knee also?

A. Right. She didn't have a direct injury to the left knee as a result of the accident, but I related the two because she was protecting the right knee and overcompensating with the left leg.¹²

Dr. Koprivica believed that claimant was at MMI and assigned claimant a 2 percent impairment to the lower right extremity for partial medial meniscectomy, 8 percent for ongoing atrophy and weakness, 3 percent for calf atrophy. These ratings combined for 13 percent impairment to the lower right extremity, which converts to a 5 percent whole person impairment.¹³ For the left knee, Dr. Koprivica believed 5 percent to the lower left extremity converted to 2 percent whole person impairment would be appropriate. He then gave claimant an overall 7 percent whole person impairment as a result of her February 20, 1998 injury.¹⁴

Based on claimant's impairment, Dr. Koprivica assigned restrictions of no more than a medium physical demand level of activity, occasional lifting or carrying up to 50 pounds, frequent lifting or carrying should be limited to up to 20 pounds, constant lifting or carrying should be limited to less than 10 pounds. No squatting, crawling, kneeling or climbing.

¹² Koprivica Depo. at 10-11.

¹³ *Id.*, Ex. 2 at 14.

¹⁴ *Id.*, Ex. 2 at 15.

Sitting is preferred, and claimant should consider finding alternate employment. These restrictions are based on an 8 hour day.¹⁵ He also testified that claimant sustained a 46 percent task loss as a result of her injury based upon the vocational analysis offered by Mike Dreiling. Like Dr. Romito, it is Dr. Koprivica's opinion that claimant should not continue working as a pipe fitter. He indicated that "in terms of time on her feet and the squatting, crawling, those types of activities I would not advise her not to."¹⁶

Dr. Koprivica was also asked whether the regular duties of a pipe fitter would aggravate her knee condition more than the activities standing at a bench. He responded by stating that "I would expect that the pipe fitter activities would be more than just standing, but both do and I would say the pipe fitter would be more."¹⁷

When the parties were unable to agree to further treatment relative to the left knee, the ALJ appointed Dr. Truett Swaim to conduct an independent medical examination. This examination took place on March 7, 2000. Dr. Swaim issued his report and with respect to the left knee offered the following:

In terms of the left knee condition, I do not believe the left knee condition is as a direct result of the injury of February 20, 1998. Within a reasonable degree of medical certainty, considering this lady's occupational history of being a pipefitter, she most likely, had some patellar chondromalacia pre-existing, which was aggravated to the point that it became symptomatic, protecting the right knee and putting more stress on the left knee postoperatively.¹⁸

The ALJ awarded claimant a 13 percent impairment to the right knee only. In his Award, he explained as follows:

Addressing the issues then of the nature and extent of the injury which is really the essential element of this case, it is considered to be inappropriate to impose an onerous award for work disability upon an employer who by usage of the parties, which redowns [sic] to the benefit of the employee and her union, for a single isolated incident which was hardly the type of thing that would do anything more than aggravate a pre-existing condition to one of her limbs.¹⁹

¹⁵ *Id.*

¹⁶ *Id.* at 24.

¹⁷ *Id.* at 32.

¹⁸ Swaim IME Report (Mar. 7, 2000) at 5.

¹⁹ ALJ Award (Feb. 10, 2005) at 7.

The Board has considered the record as a whole, including the parties' arguments and concludes the ALJ's Award should be affirmed, albeit for a different legal rationale.

The crux of this case is whether claimant's left knee complaints are causally related to her compensable injury or attributable to a subsequent injury occurring while she was employed by another respondent. Claimant maintains her left knee was the natural and probable result of her right knee injury. Respondent contends only the right knee impairment is its responsibility, and that any left knee complaints occurred while claimant was engaged in the admittedly heavy work as a pipe fitter, which she continued to perform after leaving respondent's employ.

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*,²⁰ the Court held:

When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury. (Syllabus 1).

However, the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman*,²¹ the Court attempted to clarify the rule:

The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig*,²² the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an

²⁰ *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

²¹ *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

²² *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber*,²³ the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was “a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back.”

In situations such as this, there is often a very fine line between what would be described as a new and separate accidental injury or aggravation versus a natural consequence of the original injury. In this instance, the Board has carefully considered the medical testimony in this case and finds that claimant sustained an acute injury on February 20, 1998, while in respondent’s employ which left her with a 13 percent permanent impairment to her right knee. This compensates her for the surgical repair of her torn right meniscus as well as the resulting atrophy and weakness.

The Board is further persuaded that the greater weight of the medical evidence indicates that claimant sustained a series of injuries to her left knee which culminated over a period of time while working for other employers and not for this respondent. In making this determination, the Board acknowledges that the physicians have, on the surface, testified that claimant’s right knee injury led to her left knee complaints. However, when examined closely and weighed against claimant’s testimony that she returned to her pipe fitting job duties, working 40-plus hours a week, earning at least a comparable wage, albeit with the normal periods of layoff which was typical in the industry, up to 2003, the Board concludes claimant sustained a series of aggravations while performing her pipe fitting duties. This series ended sometime after claimant left respondent’s employ and therefore, no award for permanent partial disability compensation can be issued against this respondent for that resulting impairment.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated February 10, 2005, is affirmed.

²³ *Graber v. Crossroads Cooperative Ass’n*, 7 Kan. App. 2d 726, 648 P.2d 265, rev. denied 231 Kan. 800 (1982).

IT IS SO ORDERED.

Dated this _____ day of June, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stephen P. Doherty, Attorney for Claimant
Stephanie Warmund, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director